Dehias Holdings Sdn Bhd v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia

HIGH COURT (ALOR SETAR) — JUDICIAL REVIEW APPLICATION NO KA-25–3–01 OF 2021
ARIK SANUSI JC
17 JUNE 2021

Civil Procedure — Stay of proceedings — Applicant prayed for stay in application for leave for judicial review — Prayer not allowed by court — Appeal against decision — Whether there was merit in respondent's objection to prayer

This was an appeal by the applicant against the decision of the court in not allowing prayer No (2) of the applicant's application for leave for judicial review ('encl 1'). The applicant had filed a judicial review application on 25 January 2021. The leave application for judicial review was heard ex parte on 26 April 2021 with the presence of learned senior federal counsel who acted on behalf of the attorney general. At the hearing of the leave application, learned senior federal counsel had informed the court that the Attorney General's Chambers had no objection to the leave application except with regard to prayer No (2) ie 'that all further proceedings including the enforcement and effect of the decision be stayed until the full and final determination of the application to quash the decision'. Learned senior federal counsel's objection to prayer No (2) was mainly based on two grounds: (a) stay in essence was an injunction against the government; and (b) stay application must be heard inter partes. The issue for consideration was whether there was merit in learned senior federal counsel's objection to prayer No (2) as stated in encl 1.

Held, dismissing the applicant's prayer No (2) with costs of RM2,000:

(1) Even though the applicant in crafting the relief in prayer No (2) used the word 'stay', the applicant was in essence seeking an interim injunction against the respondent. If prayer No (2) was granted, the respondent was estopped and restrained from performing its official function and public duty to collect revenue for the government until the final determination of the substantive application for judicial review. By virtue of s 29 of the Government Proceedings Act 1956 and s 54 of the Specific Relief Act 1950, the applicant's stay application which was akin to an injunction should not be granted as the applicant was clearly estopped from seeking an injunction against the government and its officers (see paras 16 & 20).

(2) Prayer No (2) should be heard inter partes and not ex parte. This was to allow the putative respondent, who had all the facts and information, to

reply to the special circumstances that had been shown by the applicant in his leave application for judicial review. Therefore, the applicant's application for stay at this juncture was premature and hence, in the interest of justice and fairness, prayer No (2) should not be allowed and granted in this leave application (see paras 26–27).

[Bahasa Malaysia summary

Ini adalah rayuan pemohon terhadap keputusan mahkamah yang tidak membenarkan permohonan No (2) daripada permohonan pemohon untuk kebenaran semakan kehakiman ('lampiran 1'). Pemohon telah memfailkan permohonan semakan kehakiman pada 25 Januari 2021. Permohonan kebenaran untuk semakan kehakiman didengar ex parte pada 26 April 2021 dengan kehadiran peguam kanan persekutuan yang bijaksana yang bertindak bagi pihak peguam negara. Pada pendengaran permohonan kebenaran, peguam kanan persekutuan yang bijaksana telah memberitahu mahkamah bahawa Jabatan Peguam Negara tidak mempunyai bantahan terhadap permohonan kebenaran kecuali berkenaan dengan permohonan No (2) iaitu 'bahawa semua prosiding selanjutnya termasuk penguatkuasaan dan kesan keputusan ditangguhkan sehingga penentuan penuh dan terakhir permohonan untuk membatalkan keputusan'. Bantahan peguam kanan persekutuan yang bijaksana untuk permohonan No (2) adalah berdasarkan dua alasan: (a) penangguhan pada hakikatnya adalah injunksi terhadap kerajaan; dan (b) permohonan penangguhan mesti didengar inter partes. Isu untuk pertimbangan adalah sama ada terdapat merit dalam bantahan peguam kanan persekutuan yang bijaksana terhadap permohonan No (2) seperti yang dinyatakan dalam lampiran 1.

Diputuskan, menolak permohonan No (2) pemohon dengan kos RM2,000:

(1) Walaupun pemohon dalam membuat relif dalam permohonan No (2) menggunakan perkataan 'tangguh', pemohon pada hakikatnya memohon injunksi interim terhadap responden. Sekiranya permohonan No (2) dibenarkan, responden diestop dan dilarang menjalankan fungsi rasminya dan tugas awam untuk mengumpulkan pendapatan bagi kerajaan sehingga penentuan akhir permohonan substantif untuk semakan kehakiman. Berdasarkan s 29 Akta Prosiding Kerajaan 1956 dan s 54 Akta Relif Spesifik 1950, permohonan penangguhan pemohon yang serupa dengan injunksi tidak boleh diberikan kerana pemohon dengan jelas diestop daripada memohon injunksi terhadap kerajaan dan pegawainya (lihat perenggan 16 & 20).

(2) Permohonan No (2) harus didengar secara inter partes dan bukan ex parte. Ini untuk membolehkan responden putatif, yang memiliki semua fakta dan maklumat, untuk menjawab keadaan khas yang telah ditunjukkan oleh pemohon dalam permohonan kebenaran untuk semakan kehakiman. Oleh itu, permohonan pemohon untuk

penangguhan di saat ini adalah terlalu awal dan oleh itu, demi keadilan dan kesaksamaan, permohonan No (2) tidak boleh dibenarkan dan diberikan dalam permohonan kebenaran ini (lihat perenggan 26–27).]

Cases referred to

Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213, CA (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150, FC (refd)
Superintendent of Land and Surveys, Bahagian Mukah & Anor v Bunyak Anak Gadin & Ors [2016] MLJU 1739; [2016] 5 CLJ 558, CA (refd)
Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (refd)
Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor [2018] 4 MLJ 350, CA (refd)
Syarikat Berpakat v Lim Kai Kok [1983] 1 MLJ 406 (refd)
Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors [2013] 3 MLJ 676; [2013] 3 CLJ 1115, CA (refd)

Legislation referred to

Government Proceedings Act 1956 s 29
Rules of Court 2012 O 53 r 2(3)
Specific Relief Act 1950 s 54

S Saravana Kumar (Rosli Dahlan Saravana Partnership) for the applicant.
Aliza bt Jamaludin (Senior Federal Counsel, Kedah State Legal Advisor's Office) for the respondent.

Arik Sanusi JC:

INTRODUCTION

[1] This is an appeal by the applicant against the decision of this court in not allowing prayer No (2) of the applicant's application for leave for judicial review dated 25 January 2021 ('encl 1') with costs of RM2,000.

FACTUAL BACKGROUND

[2] The applicant had filed a judicial review application on 25 January 2021. The leave application for judicial review was heard ex parte on 26 April 2021 with the presence of learned senior federal counsel who acted on behalf of the attorney general.

[3] At the hearing of the leave application, learned senior federal counsel had informed this court that the Attorney General's Chambers had no objection to the leave application except with regard to prayer No (2).

[4] For reference, the prayers for the leave application are as the followings:

(1) THAT the applicant be granted leave of this honourable court to file an application for —

(a) An order for certiorari to quash the respondent's decision in the form of a bill of demand dated 27 October 2020 ('decision') on the grounds that the said decision of the respondent in this respect was illegal, void, unlawful and/or in excess of authority, had been irrational and/or unreasonable, and resulted in a denial of the applicant's legitimate expectations;

(b) A declaration that the 27 lots of Malay reservation land ('Malay lots') held under individual titles all in Mukim Ayer Puteh, Daerah Pendang, Kedah ('the lots') sold by the applicant to TH Mestika Sdn Bhd ('TH Mestika') through the sale and purchase agreement dated 26 May 2016 is an exempt supply by virtue of item 1(1) of the First Schedule of the Goods and Services Tax (Exempt Supply) Order 2014 ('Exempt Supply Order') and thus not subject to Goods and Services Tax ('GST'); and

(c) A declaration that the respondent is bound by and shall give effect to the express wording of item 1(1) of the First Schedule of the Exempt Supply Order that the supply of any land used for agricultural purposes is an exempt supply and thus not subject to GST:

(2) THAT all further proceedings including the enforcement and effect of the decision be stayed until the full and final determination of the application to quash the decision;

(3) THAT all necessary and consequential directions and orders be given;

(4) THAT the costs of this application be costs in the cause; and

(5) ALL other and further relief which this honourable court deems fit and proper.

[5] Hence, the prayer that had been specifically objected by learned senior federal counsel and being the subject of this appeal is 'that all further proceedings including the enforcement and effect of the decision be stayed until the full and final determination of the application to quash the decision'.

[6] Learned senior federal counsel's objection to prayer No (2) was mainly based on two grounds. Firstly, stay in essence is an injunction against the government and secondly, stay application must be heard inter parte.

[7] The applicant's learned counsel on the other hand submitted that prayer No (2) should be allowed based on the following special circumstances:

(a) the balance of convenience favours the granting of the stay;

(b) the applicant will face irreparable damage and undue hardship should the stay be refused;

(c) the applicant's history as a law-abiding, responsible and good corporate taxpayer;

(d) the real threat of civil action and collection of unauthorised taxes by the respondent; and

(e) the respondent's failure to exercise its powers accordingly.

ISSUE TO BE DECIDED

[8] The sole issue to be decided by this court in this leave application is whether there was merit in learned senior federal counsel's objection to prayer No (2) as stated in encl 1.

FINDING AND DECISION OF THE COURT

[9] After hearing the submissions of learned counsel for the applicant and learned senior federal counsel and considering the authorities submitted by both parties, it was the finding of this court that there was merit in learned senior federal counsel's objection to prayer No (2) as stated in encl 1, for the reasons stated below. Therefore, prayer No (2) was not allowed in this leave application.

Stay is an injunction against the government

[10] It is trite that pursuant to O 53 r 2(3) of the Rules of Court 2012 ('the ROC'), s 29 of the Government Proceedings Act 1956 (Act 359) and s 54 of the Specific Relief Act 1950 (Act 137), no injunction could be issued against the government or its officers. In this respect, O 53 r 2(3) of the ROC provides as follows:

> 2 Applications (O 53 r 2)
>
> (1) An application for any of the reliefs specified in para 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 109.
>
> (2) An application for judicial review may seek any of the reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.
>
> (3) Upon the hearing of an application for judicial review, *the court shall not be*

confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided that the power to grant an injunction shall be exercised in accordance with the provisions of s 29 of the Government Proceedings Act 1956 [Act 359] and s 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application. (Emphasis added.)

[11] Whilst s 29 of the Government Proceedings Act and s 54 of the Specific Relief Act provides as follows:

(a) Government Proceedings Act:

Section 29 Nature of relief

(1) In any civil proceedings by or against the government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that —

(b) *where in any proceedings against the government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction* or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(c) in any proceedings against the government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the government to the land or property or to the possession thereof.

(2) *The court shall not in any civil proceedings grant any injunction or make any order against an officer of the government* if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government. (Emphasis added.)

(a) Specific Relief Act:

Section 54 Injunction when refused

An injunction cannot be granted —

(a) ... ;

(b) ... ;

(c) ... ;

(d) *to interfere with the public duties of any department of any government in Malaysia*, or with the sovereign acts of a foreign government;

...

(k) ... (Emphasis added.)

[12] The protection afforded to the government, its officers and its departments from an injunction as provided for in the abovementioned legal provisions has been recognised in a number of case laws. For example, in the Court of Appeal case of *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751, Suriyadi Halim Omar JCA (as he then was) in delivering the judgment of the court has stated at held (4) as follows:

(4) Notwithstanding the High Court's discretion to grant an injunction, *s 29 of the GPA does not permit the granting of any injunction against the government. Likewise, s 54 of the SRA prohibits the grant of an injunction against any Malaysian government department*. The words of s 29(1)(a) of the GPA are quite clear and there is no reason to depart from it. (Emphasis added.)

[13] In another Court of Appeal case of *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676; [2013] 3 CLJ 1115, Azahar Mohamed JCA (as he then was) has decided as follows:

[14] But that is not all. An injunction, interim/interlocutory or permanent, cannot be granted against the government under s 29 of the GPA and under s 54 of the SPA. The authority to support this proposition can be found in the decision of our then Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1987] 2 CLJ 195; [1987] CLJ Rep 170 (SC). In particular, the relevant passage from the judgment states:

> This means that no injunction could be directly or indirectly issued against the government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

[14] Further, in the case of *Superintendent of Land and Surveys, Bahagian Mukah & Anor v Bunyak Anak Gadin & Ors* [2016] MLJU 1739; [2016] 5 CLJ 558, in delivering the decision of the Court of Appeal, Abdul Aziz Abdul Rahim JCA held as follows:

[16] With regard to the appeal on the granting of the injunction, *we agree with the submission by the learned state legal officer that injunction cannot lie against the government or a government department to stop them from carrying out their public duties*. The effect of s 29 of the Government Proceedings Act 1956 and s 54 of the Specific Relief Act 1950 was discussed by this court in *Superintendent of Lands and*

Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751 where it was held as follows:

> (4) *Notwithstanding the High Court's discretion to grant an injunction, s 29 of the GPA does not permit the granting of any injunction against the government. Likewise, s 54 of the SRA prohibits the grant of an injunction against any Malaysian government department. The words of s 29(1)(a) of the GPA are quite clear and there is no reason to depart from it*. Under s 29(1)(b) of the GPA, although the court is prohibited from making an order for the recovery of land or the delivery of property in proceedings against the government for the recovery of land or other property, the court may make an order declaring that a plaintiff be entitled to such land or property. Thus an aggrieved plaintiff, though unable to recover the land is not deprived of certain entitlement, such as compensation. In the instant case, in view of the statutory prohibitions, there was no prospect of the respondent recovering possession of the land from the government. Thus, there was no reason why an injunction should have been granted at all ...
>
> [17] Accordingly we allowed the appeal on this point and set aside the High Court order granting the prohibitory and mandatory injunction against the first and second defendants. (Emphasis added.)

[15] The above-cited authorities clearly explained that whilst the court upon hearing of an application for judicial review may make any orders including an order of injunction, the power to grant an injunction shall be exercised in accordance with the provisions of s 29 of the Government Proceedings Act and s 54 of the Specific Relief Act where there are specific bar to an injunction against the government.

[16] In this case, this court is agreeable with the submission of learned senior federal counsel that even though the applicant in crafting the relief in prayer No (2) used the word 'stay', the applicant is in essence seeking an interim injunction against the respondent. This is because, if prayer No (2) is granted, the respondent is estopped and restrained from performing its official function and public duty to collect revenue for the government until the final determination of the substantive application for judicial review.

[17] Based on the facts of this case, learned senior federal counsel submitted that what the applicant is asking from this court against the respondent is in effect an injunction because the effect of the relief sought is to stop the effect of the bill of demand which requires the applicant to pay the GST duty within 14 days from the date of the bill of demand and to stop the Director General of Customs who is the respondent in this case from taking action to recover the monies sought by way of bill of demand issued upon the expiry of the time stipulated in the bill of demand, pending the determination of the substantive application for judicial review. Thus, by granting the stay order, the court is

sanctioning this stopgap towards generating revenue by the government agency and restraining the agency from performing its official function.

[18] The Federal Court in the case of *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 has decided that restraining the appellant until the trial of the suit from remaining in the quarters, is in effect a mandatory injunction. Abdoolcader J (as he then was) in his judgment has made the following observation:

> The first is that *it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction*. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (*Shepherd Homes Ltd v Sandham* (at p 359) *Hounslow Local Borough Council v Twickenham Garden Developments Ltd* (at p 570–1), and as I said in my judgment in *Wah Loong (Jelapang) Tin Mine Sendirian Berhad v Chai Nyen Yiok*, an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. (Emphasis added.)

[19] Further, the Court of Appeal in *Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor* [2018] 4 MLJ 350 has decided to refuse a stay pending the disposal of an appeal pursuant to the dismissal of judicial review application as it would restrain and prohibit the commission from performing its constitutional function. In delivering the judgment of the court, Idrus Harun JCA (as he then was) has held as follows:

> [6] What comes sharply into focus in this motion is whether the learned judge erred when His Lordship held that special circumstances existed to warrant a stay of all local enquiries in the state of Selangor pending an appeal which the respondent intended to file, and which it did actually file subsequently against the decision of His Lordship in dismissing the judicial review application.
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> ...
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> [9] It is necessary to emphasise that the constitutional function affected by the stay order here is the convening of local enquiries in the state of Selangor ... *The stay order granted by the learned judge in the court below is very much closely akin to an injunction which in effect and substance operates to restrain or prohibit the commission from performing its constitutional functions*. The stay order ought not to have been granted as ultimately, such order directly prevents the House of Representatives from receiving the report and making a decision thereon.
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> ...
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> [15] Thus, an important point that has clearly emerged from this position is that *when the stay order is granted by the learned judge*, *His Lordship does not seem to realise that, such stay order operates to restrain the commission from conducting the local enquiries and effectively prohibits the commission from taking any further step* in the whole and continuous process of delimitation of constituencies. (Emphasis added.)

[20] Therefore, by virtue of s 29 of the Government Proceedings Act and s 54 of the Specific Relief Act, this court is of the considered view that the applicant's stay application which is akin to an injunction should not be granted as the applicant is clearly estopped from seeking an injunction against the government and its officers.

Stay application must be heard inter partes

[21] It is trite that for a stay to succeed the applicant must show there are special circumstances to justify the stay application and it is within the discretionary power of the court to grant such stay.

[22] In this respect, Hashim Yeop A Sani J (as he then was) in the case of *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406 has held as follows:

> The law on the granting of an order for stay of execution has been examined a number of times in the courts of this country. *It is trite law that the court has an absolute and unfettered discretion to grant or refuse an application for stay*. As a rule the court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application. (Emphasis added.)

[23] The same principle has been upheld by the Federal Court in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257. In delivering the judgment of the court, Augustine Paul JCA (as he then was) has stated that:

> *The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well established in this country* (see, for example, the Federal Court cases of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 and *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119).
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> ...
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> *The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution*. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406). *Where it is alleged that there is a danger of the unsuccessful party not being repaid if its appeal is successful* for any reason like, for instance, the insolvency of the other party, *this must be shown in the affidavit* (see *The Annot Lyle* [1886] 11 PD 114). (Emphasis added.)

[24] Following the Federal Court's decision in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd*, Zawawi Salleh JCA (as he then was) in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213

has set out the principles of stay proceedings as follows:

PRINCIPLES OF STAY PROCEEDINGS

[22] Now, what factors or principles will, and should, guide the courts in applications for a stay of an order granted by a court. These factors or principles have been reiterated in very many of cases decided by our courts. *The factors or principles so enumerated are inexhaustive*, and not all of them are applicable to every case. Each has its own peculiar principle. Some of the principles to be considered in the motions may be stated as follows:

(a) *the courts have an unimpeded discretion to grant or refuse stay*. In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically (see *Serangoon Garden Estate Ltd v Ang Keng* [1953] 1 MLJ 116; *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86);

(b) *an unsuccessful party applying for a stay must show 'special circumstances'. What will constitute 'special circumstances' will no doubt vary from case to case. The fact that an appeal would be rendered nugatory if stay was refused is the most common one* (*see Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 and *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131). The application is not granted as a matter of routine and it is not an automatic or mechanical relief slavishly followed after filing an appeal. In every matter or suit before a court of law, whether in its original or appellate stage of proceedings, the court will consider the competing rights of both parties including the applicant and respondent to justice;

(c) there is a need to preserve the res or preservation of the subject matter of litigation. *The courts have an obligation to protect the res for the purpose of ensuring that the appeal, if successful, will not be rendered nugatory* (see *Erinford Properties Ltd v Cheshire County Council* [1974] 2 WLR 749). But where it is shown by affidavit evidence, say by the respondent, that the res will not be destroyed or there is in fact no res, an application may not be granted ... (Emphasis added.)

[25] Based on the above-cited authorities, it is crystal clear that the granting of stay application is within the discretionary power of the court and the onus is on the applicant to show there are special circumstances to justify the stay.

[26] However, with regard to this leave application, this court is agreeable with learned senior federal counsel's submission that prayer No (2) should be heard inter partes and not ex parte. This is to allow the putative respondent, who has all the facts and information, to reply to the special circumstances that have been shown by the applicant in his leave application for judicial review, which can be summarised as follows:

(a) the balance of convenience favours the granting of the stay;

(b) the applicant will face irreparable damage and undue hardship should the stay be refused;

(c) the applicant's history as a law-abiding, responsible and good corporate taxpayer;

(d) the real threat of civil action and collection of unauthorised taxes by the respondent; and

(e) the respondent's failure to exercise its powers accordingly.

[27] Therefore, it is the considered view of this court that the applicant's application for stay at this juncture is premature and hence, in the interest of justice and fairness, prayer No (2) should not be allowed and granted in this leave application.

CONCLUSION

[28] The grant of a stay of application is within the discretionary power of the court and it must be exercised judiciously. As the applicant has to show special circumstances before the stay could be granted, it will only be fair and proper in a judicial review application, the stay application being heard inter partes. This would give the putative respondent right to be heard and to answer all the issues raised by the applicant in the stay application.

[29] Based on the aforementioned reasons, this court is of the view that there is merit in learned senior federal counsel's objection to prayer No (2) in the leave application for judicial review. Therefore, this court had dismissed the applicant's prayer No (2) with costs of RM2,000.

Applicant's prayer No (2) dismissed with costs of RM2,000.

Reported by Ahmad Ismail Illman Mohd Razali